United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7263

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 76-7263

JOHN E. WILLIAMS

Plaintiff-Appellant

vs.

JOSEPH A. WALSH, ETC., ET AL

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF DEFENDANTS-APPELLEES

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42 U.S.C.A. Sec. 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

R.S. § 1979.

Rule 54. Judgments; Costs

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

(d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

As amended Dec. 27, 1946, eff. March 19, 1948; Apr. 17, 1961, eff. July 19, 1961.

Rule 56. Summary Judgment.

(a) FOR CLAIMANT. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) FOR DEFENDING PARTY. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) CASE NOT FULLY ADJUDICATED ON MOTION. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in

the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) WHEN AFFIDAVITS ARE UNAVAILABLE. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) AFFIDAVITS MADE IN BAD FAITH. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

1. APPELLANT'S BRIEF FAILS TO PROPERLY ASSESS THE CHOICE OF LAW ISSUE IN APPLYING THE STATE STATUTE OF LIMITATIONS TO A FEDERALLY CREATED RIGHT UNDER 42 U.S.C.A. SEC. 1983

51 Am Jr 2d, Statute of Limitations, Sec. 74 (1970) at page 653, in discussing a federal court's use of a borrowed state statute of limitations concerning federally-created rights, indicates:

> . . . Further more, the federal courts, including the United States Supreme Court, will accept the decision of the highest state court upon the characterization and applicability of the state statute of limitations, at least where that characterization is not unreasonable or otherwise inconsistent with federal policy with regard to the federally created right. In determining which period of limitation to apply to an action under a particular federal statute, the federal court accepts the state's interpretation of its own statutes of limitation, BUT DETERMINES FOR ITSELF THE NATURE OF THE RIGHT CONFERRED BY THE FEDERAL STATUTE. (Emphasis added)

The Fifth Circuit in Bell v. Aerodex, Inc., 473 F.2d 869 (5th Cir. 1973) at page 871 reiterates the aforementioned principle that the federal court should characterize the Sec. 1983 issue under federal law and then apply the state statute of limitations applicable thereto ONCE THE COURT has established THE NATURE OF THE RIGHT UNDER FEDERAL LAW. The following quote from the Bell Case, Supra, illustrates the dynamics of the process:

> Deciding which statutory period is appropriate, however, is a two step process. First with reference to federal law, we must determine the "essential nature" of the claim. Then we refer to the state court interpretations of that state's "statutory catalogue" to ascertain which period would be applicable to a claim similar to the

one before the court (Cites omitted).

Appellant's brief incorrectly utilizes the aforementioned choice of law process in applying the state statute of limitations to a Sec. 1983 proceeding. For, appellant fails to characterize the claims stated in his complaint in accordance with federal law. Instead, appellant characterizes the nature of the cause of action presented in his complaint as a mandamus proceeding under Connecticut law. Appellant illustrates his incorrect choice of law methodology on page 10 of his brief:

> Plaintiff's central claim--that he was discharged illegally and is entitled to reinstatement--states a cause of action that UNDER CONNECTICUT LAW (emphasis added) would be appropriately characterized only as mandamus. Connecticut cases establish the proposition that mandamus is the proper remedy for a public officer (including a police officer) claiming illegal discharge and seeking reinstatement (Cites omitted).

Appellee maintains that appellant is incorrect in his attempt to characterize the cause of action (i.e. mandamus) under state law. Under the aforementioned principles, federal law is to be used for characterizing the cause of actionin applying the state statute of limitations thereto. Since the trial judge has characterized the claims presented by appellant in his complaint as stating a cause of action sounding in tort under the principles of the federal law, the appellant, in arguing the state statute of limitations, is only able to attack on review the District Court's characterization of the cause of action under the principles of federal law. Appellant may not introduce analogous state law characterizations of the cause of action. For, as was stated in Monroe v. Pape, 365 U.S. 167, 173-74, 815 Ct. 475, 477-78, 5L. Ed 2d 492 (1961):

> The legislation--in particular the section with which we are now concerned (i.e. 42 U.S.C. Sec. 1983)--had several purposes. There are threads of many thoughts running through the debates.
>
> First, it might, of course, override certain kinds of state law . . .
>
> Second, it provided a remedy WHERE STATE LAW WAS INADEQUATE (emphasis added).
>
> The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.

As such, federal courts are not bound by the limited theories of state legal remedies but are only bound to apply state statutes of limitations. As a result of this, federal common law has been created. See Bivens v. Six Unknown Agents of Fed. Bur. of Narc., 91 S. Ct. 1999, 402 U.S. 388 (1971) wherein the Supreme Court creates a federal common law tort cause of action upon Its determination that the state legal remedy is ineffective. Once the federal District Court has determined that this was an action in tort under FEDERAL LAW, the District Court was bound to apply the relevant state tort statute of limitations. Reference to state law is limited to the applicable state limitation period.

For the aforementioned reasons, appellee prays for affirmance of the District Court's judgment and dismissal of appellant's case on appeal.

2. Assuming arguendo that the appellant is correct in utilizing state law in order to characterize the cause of action presented in his complaint under 42 U. S. C. A. Sec. 1983, was appellant accurate in concluding that mandamus was the applicable state cause of action for purposes of applying the state Statute of Limitation?

Under Connecticut Law, Comley v. Boyle, 115 Conn. 406, 412 (1932) presents the requirements for the issuance of a writ of mandamus:

> "1. The party against whom the writ is sought be under an obligation imposed by law to perform some such duty, that is, a duty in respect to the performance of which he may not exercise discretion;
>
> 2. The party applying for the writ has a clear legal right to have the duty performed; and,
>
> 3. There is no other sufficient remedy (cites omitted)."

Clearly, appellant's claim that the action be characterized as a mandamus proceeding is wrong in view of the aforementioned requirements stated in the Boyle case, supra because the action of the police commissioners was discretionary (i. e. determine the meaning of "just cause") and the appellant has failed to establish any clear "legal right" to his position prior to the bringing of the present action. In essence, the case for reinstatement is not in the nature of a proceeding in mandamus as stated in appellant's brief. The appellee's Board of Police Commissioners is under no "Legal Obligation" to reinstate the officer nor has the appellant established a "Clear and

Undisputed Legal" right to the police position. The State of Connecticut ex rel-Comstock v. Hempstead, 83 Conn. 554 (1910) differentiates between a proceeding in "mandamus" and "quo warranto". To establish the clear right to the office, the appellant must first resort to "quo warranto" proceedings. After his right to the office is clearly established, then the appellant may resort to a mandamus action to enforce his clearly established rights.

In the case at hand, appellant's suit encompasses disputed issues of a potentially constitutional nature which are not amenable to a mandamus proceeding. Duane v. McDonald, 41 Conn. 517 states:

> ". . .'we (denoting the State of Connecticut) definitely adopted the English rule in preference to the Massachusetts rule which permits title to be tried by mandamus to restore one to an office.' We added: 'Mandamus neither gives nor defines rights which one does not already have. . . It acts at the instance of one having a complete and immediate legal right; it cannot and does not act upon a doubtful or a contested right, hence it cannot adjudicate a title, nor settle conflicting claims to an office. It is an expeditious remedy called into action to protect an undoubted legal right."

The Comley case, supra, indicates in the following passage that the issue of constitutionality may not be litigated in a mandamus proceeding at pg. 414:

> ". . . In the present case the relator asks that, even if under the ordinance he has no legal right to the permit which he seeks, the court (should) pass upon the constitutionality of the provision of the ordinance which denies this right in order

> to determine whether or not he has a right to the permit notwithstanding this provision. Manifestly he does not come into the court in the first instance asking the enforcement of an established right which he then has. He has a means of determining his right by other appropriate proceedings. There is a dispute between him and the city officials as to whether he has a right to a permit to erect his building. It has been held by many courts that where there is such a dispute, mandamus will not lie. State ex rel. Comstock v. Hempstead, 83 Conn. 554, 78 Atl. 442; Ex parte Hussein v. Lufti Bey, 256 U. S. 616, 41 Sup. Ct. 609; Inglin v. Snider, 163 Cal. 747, 127 Pac. 60; People ex rel. McMackin v. New York Board of Police, 107 N. Y. 235, 13 N. E. 920: Brooklyn Improvement Co. v. Pounds, 174 App. Div. 448, 161 N. Y. Sup. 585.

American Casualty Ins. Co. v. Fyler, 60 Conn. 448 (1891) defines a "ministerial act":

> "A ministerial act is one which a person performs in a given state of facts. . . in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done."

Clearly, the relationship between the discharge and the protection of potentially abridged constitutional rights alleged in appellant's complaint denies the analogy between a mandamus proceeding and the present one. For, an adjudication of the constitutional issues will govern appellant's right to the relief he requests in his complaint. The principles enunciated in the Comley case, supra, concerning the availability of a mandamus proceeding are carried forward to the present day and applied in Sweda v. Loughlin, 29 Conn. Sup. 149 (Sup. Ct. 1970).

State ex rel. The Newfield Swim Club, Inc. v. Swinnerton, 22 Conn.

Sup. 336 (Ct. of Com. Pleas 1960) at page 339 further describes the limited availability of a mandamus proceeding. The Swinnerton case presents the conditions under which a mandamus proceeding is available:

> "It must be concluded that nothing remains to be done but the purely ministerial act of issuing the permit."

Appellee contends a mandamus proceeding is not appropriate on the basis of the aforementioned principles. As such, appellee prays for affirmance of the District Court's judgment and dismissal of appellant's case on appeal.

3. Assuming arguendo that mandamus is the proper characterization of the cause of action stated in appellant's complaint, does the equitable doctrine of laches prevent the maintenance of the present action on appeal?

Assuming, for the sake of argument, that mandamus is the appropriate proceeding, note that Morgan v. Sullivan, 155 Conn. 630, 635 (1967) indicates:

> The general rule is that a plaintiff must not unreasonably delay the assertion of his claim, and cannot recover a judgment if he has inexcusably failed to prosecute the proceeding in a timely fashion so that, in the event his contention is found to be justified, the government service may be disturbed as little as possible and two salaries shall not be paid for a single service..

In our case, appellant had failed to file his Civil Rights claim for four years. As a result, the appellee City was seriously injured in that it was required to hire an additional policeman to fill appellant's vacancy due to this unreasonable delay.

55 C.J.S. Mandamus Sec. 244(a) reiterates the principles underlying the equitable doctrine of laches:

> The equitable doctrine of laches is applicable in mandamus proceedings; hence, the right to mandamus may be barred by laches. The court may, in the exercise of its discretion, deny an application for mandamus made after an unreasonable delay, especially, or at least, where the delay has resulted, or may result, prejudicially to the rights of respondent or others interested, as by misleading them or causing them to adopt

> a course different from that which they would otherwise have taken, or has brought about conditions that would make it almost impossible to do the acts which it is sought to compel. There is also authority to the effect that, if the relator is otherwise entitled to the writ, it should not be denied unless he has so slept on his rights for such an unreasonable time that the delay has been prejudicial to defendant or the rights of other interested parties or the public. While laches cannot always be gauged or measured wholly by any statute of limitations, it has been held not to exist where the proceeding was commenced within the time prescribed by law.

In discussing the duty of plaintiff to prosecute his suit in an expeditious fashion, Sec. 244(a) of the treatise goes on to state at page 462:

> Delay in prosecuting proceeding. Laches may consist in lack of diligence in prosecuting a proceeding for mandamus after it has been commenced, as well as in delay in commencing the proceeding.

In State v. Wilkinson, 264 P. 683, 82 Mont. 15 (cited in Sec. 244(a) of the treatise, note 81), a five year delay in prosecuting a suit is deemed adequate to apply the bar of laches to the proceeding at hand, the Court states:

> Relator, filing no note of issue and taking no steps to bring mandamus case to trial for over five years after it was at issue, was held guilty of laches barring relief.

Note further, that District Court Judge Latimer essentially held in his "Ruling on Pending Motions" presented on page 78 of the Appendix to Appellant's Brief, that the appellant failed to reasonably prosecute his suit in

Federal District Court:

> Indeed, to the extent that considerations of federal policy may influence application of state law or even permit a tolling without state law basis, the very difference between the Common Pleas proceeding and the federal civil rights litigation counsels against sanctioning extended delay in choosing to institute the latter. The Civil Rights Act suit's commencement need not have awaited state judicial proceedings, and as previously noted the instant action represents far more than a renewed effort in another forum to gain reinstatement, including now as well serious damage claims against various individuals here accused of intentional misconduct. At least in such circumstances, there appears no sound reason to postpone bringing the federal action and accordingly no persuasive justification for suspending the running of the statute of limitations.

Since Judge Latimer's finding is a "finding of fact," review of his conclusion is to be performed under the "clearly erroneous" standard adopted for Fed. Rule Civ. Prac. rule 52(a), 28 U.S.C.A. Rule 52(a) states:

> Findings of fact shall not be set aside unless CLEARLY ERRONEOUS, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses... Findings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56.

In addition to the aforementioned reasons for the application of laches as a matter of law, the appellee maintains that appellant has already

litigated his Fifth Amendment and Due Process claims in the courts of the State of Connecticut. After failing to win therein, appellant instituted suit four years after the alleged discharge from his employment in federal District Court, or similar, if not identical claims, as those argued in the state courts. Appellee contends that the judicial policies underlying the doctrine of res judicata require the application of the time bar of laches to the present action. Appellant is vexatiously attempting to re-open a case in federal District Court decided on the merits in the state courts of Connecticut in the hope of securing a favorable judgment.

On the basis of the aforementioned principles, appellee prays for the Court of Appeals to affirm the judgment rendered by the District Court and to dismiss appellant's case on appeal.

District Court Judge Latimer's conclusion presented on page 78 of the Appendix to Appellant's Brief concerning the dissimilarity of the state and federal court causes of action has support in document No. 18 entitled "Brief In Support Of Plaintiff's Motion For Summary Judgment And In Opposition To Defendants' Motion For Summary Judgment." Appellant's argument in document No. 18 atte mpts to distinguish the causes of action presented in the state and federal courts in order to prevent the application of res judicata to appellant's District Court action. See pages 40-43 Appellee's Brief, infra (especially, page 41). As such, appellant's failure to bring the District Court action until four years after the discharge of appellant by appellee's Board of Police Commissioners was, clearly, an example of unreasonable delay which is barred by the doctrine of "laches". Appellee,

therefore, prays for affirmance of the District Court judgment and dismissal of the case on appeal.

4. IS TORT THE PROPER CHARACTERIZATION FOR THE CAUSE OF ACTION PRESENTED IN APPELLANT'S COMPLAINT?

Monroe v. Pape, 365 U.S. 167 81 S. Ct. 475, 5L Ed. 2d 492 (1961) presents the general rule of construction applied by federal courts in selecting the applicable state statute of limitations for a Sec. 1983 proceeding at page 187 of the United States Reporter:

> Sec. 1983 should be read against the background of TORT LIABILITY (emphasis added) that makes a man responsible for the natural consequences of his acts.

68 Columbia Law Review 762, 764 (1968) analyzes the significance of the aforementioned quote taken from the Monroe case and concludes by stating:

> Thus, section 1983 has recently emerged as a powerful tool in the hands of those deprived of federal constitutional rights under color of state authority. There is virtually no limit to the sorts of causes of actions it may create. It will support, for example, suits for injunctions against government dealings with business who refuse to employ Negroes; damage suits against police officers for illegal arrests, suits to remedy official deprivation of First Amendment freedoms; and suits to compel the desegregation of public facilities.
>
> Because these causes of action derive from violations of the federal constitution, it is most unlikely that a state will have a limitations statute that covers them specifically. Nevertheless, under current practice the federal courts must derive the limitations period from state law. Two distinct approaches to this problem have been adopted, neither of which has worked well.
>
> Many federal courts have seized upon the obvious fact

> that most 1983 cases that involve a statute-of-limitations issue involve a wrong that resembles some traditional tort. Consequently, they have first tried to answer such questions as whether a particular complaint sounds more like one for false imprisonment, or false arrest, or for tortious assault, and then applied the state limitations period governing that cause of action. This approach has been consistently employed by the Third Circuit

Madison v. Woods, 410 F. 2d 664 (6th Cir. 1969) cites the Monroe case and provides further support for the position enunciated therein at pages 566-67 of the court's opinion:

> Since the Civil Rights Act and the federal statutes do not contain a statute of limitations for actions brought under Sec. 1983, we will apply the most analogous period of limitations under Michigan law . . . For instance, in Mulligan v. Schlacter, 389 F. 2d 231 (6th Cir. 1968), Plaintiff alleged as a cause of action under Sec. 1983 an unlawful arrest and search by police officers. This Court "look(ed) to the most analogous statute of limitations of the state where the cause of action arose" and held that Plaintiff's claim was barred under a two-year Michigan statute of limitations applicable to "actions charging false imprisonment, malicious prosecution, or misconduct of sheriffs and their deputies". On the other hand, in Crawford v. Zeitler, 326 F. 2d 119 (6th Cir. 1964) this Court applied a general Ohio statute because Plaintiff's complaint alleged tortious conduct that was broader than and not analogous to the specific "tort(s) described in (these statutes)", that is, malicious prosecution and false imprisonment. . . . To do this, we must determine what exactly Appellant is claiming, Moviecolor, Ltd. v. Eastman Kodak Co., 288 F. 2d 80, 80 A. L. R. 2d 252 (2d Cir. 1961).
>
> Appellant, in seeking redress for a denial of equal protection under the Fourteenth Amendment, is complaining of a tortious invasion of his right to PURSUE HIS CHOSEN PROFESSION. Hague v. C. I. O., 307 U. S. 496, 59 S. Ct. 594, 83 L. Ed. 1423 (1939); see

> Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1913) (emphasis added). And he urges that this tortious invasion amounted to so much more than an ". . . injur(y) to person or property" that the three-year statute cannot be applied by analogy to bar his claim.
>
> . . . More to the point is Krum v. Sheppard, 255 F. Supp. 994 (W. D. Mich. 1966), affirmed on appeal by an order of this Court, Krum v. Sheppard, 407 F. 2d 490 (6th Cir. 1967). In that case, the District Court applied the three-year statute on the ground that a deprivation of civil rights results in injury to the person. The Court said:
>
> "The Fourteenth Amendment protects the most fundamental personal rights and liberties guaranteed to any citizen of the United States. When one is deprived of his CIVIL RIGHTS, it is clear that the injury is to his person and that he is the only one who has standing to sue." Krum v. Sheppard, 255 F. Supp. 994 (Emphasis added).
>
> The essence of an action under Sec. 1983 is, as the Court recognized, a claim to recover damages for injury wrongfully done to the person. Henig v. Odorioso, 385 F. 2d 491 (3rd Cir. 1967). Appellant's claim that he was deprived of personal liberty through alleged discrimination practiced by Appellees amounts to just that. Hague v. C.I.O. 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed 1423 (1939); Truax v. Raich, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1913).

Judge Latimer's opinion in the District Court memorandum entitled "Ruling On Pending Motions" concluded that the Connecticut tort statute of limitations was applicable to the claim presented in appellant's complaint by reasoning in a fashion similar, if not identical, to that presented in the aforementioned citations. He argues on page 3 of his "Ruling on Pending Motions" appearing at page 78 of the Appendix to appellant's brief:

> Plaintiff would analogize this action to one for mandamus, said to be limited in Connecticut only by "the equitable principle of unreasonable delay", Sullivan v. Morgan, 155 Conn. 630, 635, 236 A2d 906, 908 (1967), but the COMPLAINT GOES FAR BEYOND THE CLAIM FOR EQUITABLE REDRESS FOR WRONGFUL DISCHARGE WHICH MIGHT BE EXPECTED IN SUCH A PROCEEDING, ASSERTING RIGHTS TO DAMAGES FOR SUCH INJURIES AS "GREAT PAIN AND SUFFERING OF MIND, AND GREAT EMBARRASSMENT AND HUMILIATION" ALLEGEDLY RESULTING FROM PURPOSEFUL MISCONDUCT IN THE CLAIMED DEPRIVATION OF CIVIL RIGHTS (Emphasis added). If not as obvious as in the case of an outright physical assault, compare Bensavage v. Scully, Civil No. N-75-216 (D. Conn. Nov. 25, 1975), the more reasonable conclusion in such depicted circumstances of DELIBERATE WRONGDOING would seem that the suit's timeliness is to be measured by Connecticut's general three- year statute of limitation for actions "founded upon a tort". Cf. Conn. Gen. Stat. Sec. 52-577.

37 University of Chicago Law Review 494, 503 also agrees with the tort characterization of the Sec. 1983 proceeding:

> The only question arising in the application of state limits is the particular period to be used. One approach used consistently by the Third Circuit has been to apply the state statute applicable to the state tort action most analogous to Sec. 1983 claims . . .

The aforementioned article cites Swan v. Board of Higher Education, 319 F2d 56 (2d Cir 1963) in arguing that Sec. 1983 proceedings should apply a tort statute of limitations due to the essential gravaman of a complaint in a Sec. 1983 proceeding. Appellant's brief, ironically, relies on this case in establishing his argument that mandamus should be the basis of the characterization. Note that the court held in the Swan case, supra, that

the New York general statutory statute of limitations was applicable and did not apply the "laches" equitable standard to the cause of action because the court felt that a mandamus or Article 78 proceeding was not adequately similar to the claim presented in plaintiff's brief.

Upon the foundation of the aforementioned legal principles, appellee contends that the trial court was correct in rendering summary judgment for appellee and in characterizing the present cause of action specified in the complaint as one for tort.

Hazzlett v. Fawcett Publications, Inc., 116 F. Supp. 544 (Conn. 1953) presents the test utilized in ascertaining the gravamen (i.e. essential nature) of a cause of action:

> As to this, I observe, first that in NO EVENT WOULD THE ABOVE FACTS SUFFICE TO STATE A CLAIM FOR INVASION OF PRIVACY WITHOUT AN ALLEGATION THAT THE PUBLICATION OF THESE BARE FACTS HURT THE PLAINTIFF'S SENSIBILITIES. SUCH AN ALLEGATION IS ESSENTIAL TO EVERY ACTION FOR THE INVASION OF PRIVACY. THE RIGHT IS NOT ONE WHICH ENTITLES A PERSON TO RECOVER DAMAGES AS A WINDFALL IN THE ABSENCE OF RESULTING INJURY TO SENSIBILITIES . . .
>
> Indeed the chief argument for recognition of the right of privacy in the Warren Brandeis article in 4 Harvard Law Review 193, which did so much to stimulate the development of the law in this field was passed upon the need for a remedy to hurt feelings . . . (emphasis added).

The issue as to the proper characterization of the cause of action before the court at this time can be resolved by applying the test enunciated in the

Hazlett case, supra. For, appellant's prayer for reinstatement is a form of relief which is ancillary to, and contingent upon, proof of intentional deprivation of a claimed property right, i.e., title to office.[1] McDermott v. New Haven, 107 Conn. 451 (1928) and Tremp v. Board of Public Safety of City of Torrington, 13 Conn. Sup. 87 (Court of Common Pleas 1944) characterize the employment of a police officer as a position of "public office" to which the holder thereof possesses a legal title. Hence, appellant must prove that he was wrongfully discharged from his "rightful" public office in order to establish his right to damages and reinstatement. Holley v. McDonald, 154 Conn. 228. In addition, Skene v. Carayanis, 103 Conn. 709, 714 (1926) indicates that a tortious violation of one's right to employment occurs upon a wrongful interference with his occupation.

Appellant's claim for wrongful discharge is derived from his assertion that appellee's conduct deprived him of his civil rights protected under the Due Process Clause of the Fifth and Fourteenth Amendments, i.e. his Fifth Amendment right to remain silent and to be free from disciplinary action under a constitutionally vague departmental regulation. Krum v. Sheppard, 255 F. Supp. 994 at 997 states:

> The Fourteenth Amendment protects the most fundamental personal rights and liberties guaranteed to any citizen of the United States. When one is deprived of his civil rights it is clear that the injury is to his person and that he is the only one who has standing to sue.

The alleged purposeful, willful and malicious deprivation of appellant's personal rights is the gravaman of appellant's claim for damages and re-

instatement. Since the material allegations of the tortious claim impinge and permeate the essential features of the contingent equitable claim for reinstatement and since the equitable claim cannot stand independently of proof of the tortious invasion which gives rise to the equitable and legal rights of relief, appelle contends that the District Court's decision to apply the tort statute of limitations to plaintiff's entire complaint should be affirmed and appellant's case on appeal should be dismissed. Appellee's contention is fortified in light of the fact that Connecticut courts have interpreted Sec. 52-577 of the Connecticut General Statutes Annotated (i.e. the general tort statute of limitations) as broadly encompassing any action for a wrong not arising out of contract or governed by some more specifically applicable state. United Aircraft Corp. v. International Association of Machinists, 161 Conn. 79, 107 (1971). On the basis of the aforementioned principles, appellee maintains that the District Court judgment should be affirmed.

Footnote 1

Page 7 of document No. 18 entitled "Brief In Support Of Plaintiff's Motion For Summary Judgment And In Opposition To Defendant's Motion For Summary Judgment" states that :

> The Supreme Court recognized that a tenured employee's interest in his job is "property" fully protected by the Fourteenth Amendment, and moreover that discharges on disciplinary grounds may well involve intrusions as well into the "liberty" of government employees.

5. Does appellant's argument for the application of two separate Statute of Limitations to two alleged causes of action presented in his complaint violate the judicial policy preventing the splitting of a single cause of action ?

The appellant's contention (presented on pages 14-18 of his "Brief on appeal") that the Court of Appeals should apply separate statute of limitation periods to the wrongful discharge and reinstatement claims clearly violates the judicial policy prohibiting the splitting of a single cause of action. See Ritchie v. Landau, 475 F.2d 151 (2d Cir. 1973), and Norman Tobacco and Candy Co. v. Gillette Safety Razor, 295 F.2d 362 (5th Cir. 1961), which hold that a "litigant may not split his claim and have two trials on the same alleged breach of duty". In order to determine whether appellant has violated the aforementioned rule prohibiting the splitting of the single cause of action, it is necessary to define the term, cause of action.

RePass v. Vreeland, 357 F.2d 801, 805 (3rd Cir. 1966), presents the general principles concerning the definition of the term, cause of action:

> The difficulty of providing simple criteria to resolve this onerous problem has resulted in two schools of thought, each advocating a different test for the determination of a judicial unit. On the one hand it is urged that separate occurrences or transactions form the basis of separate units of judicial action. Reeves v. Beardall, 316 U.S. 283, 285, 62 S. Ct. 1085, 86 L. Ed. 1478 (1942),[4] citing Atwater v. North American Coal Corp., 111 F.2d 125, 126 (C.A. 2, 1940) (concurring

opinion); Coffman v. Federal Labs, Inc., 171 F. 2d 94, 96-97 (C. A. 3, 1948). On the other hand, it is maintained that "claim" should be made synonymous with "cause of action." (Cites omitted).

Fortunately, we need not explore the metaphysical distinctions between the two tests, if, in fact, any exist.

Footnote 4 referred in the above quote

4. The Reeves case was decided prior to the 1946 amendments to Rule 54(b). It is of particular importance to note that the original Rule specifically contained the language "transaction or occurrence." In Mackey the Supreme Court alluded to Reeves to point out that the unit determination provided for by the original Rule had not been questioned, 351 U. S. at 437, 76 S. Ct. 895; however, the Court did not state whether the separate transaction test had survived the 1946 amendments. In perhaps the most significant case decided since the 1946 amendments, the Fourth Circuit in Town of Clarksville, Va. v. United States, 198 F. 2d 238, 240 (1952), adhered to Reeves in determining what constitutes a "claim." See also Edney v. Fidelity & Guar. Life Ins. Co., 348 F. 2d 136, 138 (C. A. 8, 1965).

The transactional test for determining whether separate causes of action (or claims for relief) exist for purposes of Fed. Rules Civ. Proc. rule 56, 28 U. S. C. A., partial summary judgment and Fed. Rules Civ. Proc. rule 54(b), 28 U. S. C. A., appealability is presented on pages 285-86 of the Reeves case, supra:

> The Rules make it clear that it is differing occurrences or transactions which form the basis of separate units of judicial action (i.e. cause of action). . .
>
> Those two claims (or causes of action) arose wholly out of separate or distinct transactions or engagements.

In the present case on appeal, both the reinstatement and damages remedy requested by appellant are based on the same transaction or occurrence, i.e. the dismissal of appellant by the Police Board. As such, a single cause of action exists which may not be split. Appellant's argument requesting for the application of two separate statutes of limitation to two separate causes of action should, therefore, fail.

The second theory utilized by the Court in defining a cause of action is presented in Herrman v. Braniff Airways, Inc., 308 F. Supp. 1094, 1099 (S.D.N.Y. 1969):

> "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." Baltimore S.S. Co. v. Phillips, 274 U.S. 316, 321, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927).

In the present case on appeal, appellant's prayers for reinstatement and damages allege violation of a single right, i.e. the right to be free from wrongful discharge from employment resulting from purposive denial of appellant's Civil Rights. As such, under the second test utilized for defining a cause of action, appellant has failed to establish the existence of two independant causes of action.

Note that the Second Circuit has adopted the transactional test presented in the Reeves case, supra, in defining the term, cause of action. This is established in the following Second Circuit cases:

(a) Original Ballet Russe v. Ballet Theatre, 133 F. 2d 187 (2d Cir. 1943) which states: These rules have substituted for the traditional phrase "cause of action" the word "claim", which is used to denote the aggregate of operative facts which gives rise to a right enforceable in the courts.

(b) Rabekoff v. Lazere & Co., 323 F. 2d 865, 866 (2d Cir. 1963), in attempting to define separate causes of action, states: Each claim must arise from a different factual occurrence or transaction. The Reeves case, supra. Here the entire factual controversy arose from a SINGLE FACTUAL OCCURRENCE. (Emphasis added.)

Since appellant's claims for relief are based on a single transaction, appellee contends that the Second Circuit definition of "cause of action" precludes appellant from arguing that two separate causes of action are stated in his complaint due to the judicial policy prohibiting a party from splitting a single cause of action.

On the basis of the aforementioned principles, appellee prays for affirmance of the District Court's grand of appellee's motion for a summary judgment, and dismissal of appellant's case on appeal.

6. Does appellant's argument that two causes of action exist in his complaint deprive the Court of Appeals of jurisdiction of the case by violating the rules prohibiting interlocutory appeals?

Fed. Rules of Civ. Proc. rule 54 (b), 28 U. S. C. A., allows an appeal to be taken only from an adjudication of all claims presented in the case. Failure to adjudicate all of the claims in the case prevents a party from taking an appeal until final judgment on all separate claims has been entered. Note that the device of partial summary judgment under Fed. Rules Civ. Proc. rule 56, 28 U. S. C. A., has been created so as to simplify trials involving more than one cause of action by allowing dismissal for legal insufficiency of less than all of the claims presented in the case. The granting of partial summary judgment does not provide for an immediate appeal prior to the adjudication of the remaining claims presented in the case. Interlocutory appeals of this nature are governed by Fed. Rules Civ. Proc. rule 54(b), 28 U. S. C. A., and Sec. 1292 of Title 28 of the United States Code Annotated. The test utilized by Federal Courts in determining whether a case presents a multiplicity of independent claims for the purpose of a Rule 54(b) interlocutory appeal is stated in 3 Federal Practice Procedures, Wright Sec. 1193 at page 28:

> A single claimant presents multiple claims for relief when his possible recoveries are more that one in number and not mutually exclusive . . . But where a claimant presents a number of legal theories, but will be permitted to recover on at most one of them, his possible recoveries are mutually exclusive, and he has but a single claim for relief.

In our case, appellant has more than one potential basis of recovery. He can collect both damages and be reinstated. Hence, the trial court had before it a

multiplicity of claims. See Rule 56(d) which provides for the use of the partial summary judgment device and requires a full trial when at least one claim remains in the case involving a material issue of disputed fact. Also, see RePass v. Vreeland, 357 F. 2d 801 (3rd Cir. 1966).

Should the existence of two separate claims be established at the appellate level, the failure of the trial court to adjudicate both claims indicates that the appellate court chould not have jurisdiction to hear this case because the only issues which are appealable are those which derive from a final judgment. See 3 Federal Practice and Procedure, Wright Sec. 1193 at page 29 and Lockwood v. Hercules Powder Co., 172 F2d 775 (8th Cir. 1949) cited therein. The appellant is not permitted to allege grounds which will result in the court's failure to have jurisdiction over the appellate proceeding at hand.

Appellee further contends that appellant's failure to raise the existence of two separate claims in the trial court necessitates that he be estopped from denying the trial court's determination that only one cause of action was presented in appellant's complaint. Under the judicial doctrine of "invited error", appellant is foreclosed from arguing the existence of two causes of action on appeal. The general principles of the "invited error" doctrine are presented below:

(a) United States v. Wurtsbaugh, 149 F. 2d 534 (1944):

A party may not complain of error on the part of the court which was induced by him.

(b) NLRB v. Whittenberg, 165 F. 2d 102 (5th Cir. 1948):

A party cannot complain of mere irregularities to which he by his silence has consented and from which he has suffered no harm.

(c) Charles A. Hinsch and Co. v. Rowan County, Ky., 126 F. 2d 189 (6th Cir. 1942):

A reviewing court could not under theory urged for first time on appeal, find error in disposition of cause which was proper according to theory under which case was submitted to trial court.

(d) Bowles v. Marx Hidge and Tallow Co., 153 F. 2d 146 (6th Cir. 1946):

Appellant on appeal CAN NOT CHANGE THEORY OF HIS CASE (emphasis added) made by his pleadings and his conduct of the case.

(e) East Hampton Dewitt Corp. v. State Farm Mutual Auto Ins. Co., 490 F. 2d 1234 (2d Cir. 1973):

Having chosen to play for 100% recovery, plaintiff may not complain on appeal that, because of its failure to supply jury with basis for apportionment of damages., it perhaps fared worse than it should.

(g) Director General of India Supply Mission for and on Behalf of President of Union India v. Steamship Mara, 459 F. 2d 1320 (2d Cir. 1972):

Appellant cannot complain of error which was indicated by appellant's position at trial.

On the basis of these principles, plaintiff's failure to present to the trial court its contention that two separate and distinct claims for relief existed estops its attempt to raise this argument on appeal in relation to the

separate statutes of limitation allegedly applicable to them.

In conclusion, appellee prays for affirmance of the District Court's judgment and dismissal of appellant's case on appeal.

7. What is the scope of review of a District Court's determination of a question of local law?

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4 Am Jr Trials, page 450 states:

> "As there is no general statute of limitations of general application, the courts generally have applied what they deem to be the forum state's statute of limitations most in point to the federal cause of action, where the federally-created cause of action has no statute of limitations accompanying it. . . This has led to some lack of harmony as to the application of limitations to federally-created rights since, not only do the state statutory periods of limitations differ but, also the characterization of the nature of the federally created rights, as it fits within the various state statutory periods, has differed."

Federal Appellate Courts throughout the nation have limited their scope of review of lower federal court constructions and interpretations as to issues of local law. The federal Appellate Courts have deferred questions construction of local law questions to the District Courts in recognition of the superior knowledge which local District Court judges possess in construing matters of local law. This superiority of construction is derived from the greater familiarity of local District Court judges with matters of local law. The aforementioned principles of law are derived from the following case summaries:

(a) Barnard v. Wabash R. Co., 208 F2d 489 (8th Cir. 1953) at page 493 states that:

> "The considered opinion of a trial judge as to a question of local law may properly be accorded great weight by this court. It will not adopt a view contrary to that of the trial judge unless convinced of error. All that this court can be expected to do in reviewing cases governed by

state law is to see that the determination of the trial court is not induced by a clear misconception of misapplication of the law. Cites omitted. . . In Buder v. Becker, 8 Cir., 1970, 185 F2d 311, a case involving the construction of a Missouri statute, this court reiterated and reaffirmed the rule that it would not adopt a view contrary to that of the trial judge on a doubtful question of local law, unless clearly convinced of error."

(b) Douglas v. Beneficial Finance Co. of Anchorage, 469 F2d 453 (9th Cir. 1972) indicates that:

"In diversity cases, where state law controls, district judge's interpretation of the law of state where he sits will not be overturned unless Clearly Wrong particularly if the highest state court has not passed on the matter. (emphasis added)."

(c) Buehler Corp. v. Home Ins. Co., 459 F2d 1211 (7th Cir. 1974) Indiana states that:

"Where no controlling state precedent can be found appellate courts give great weight to view of state law taken by district judge experienced in law of that state, although parties are entitled to review of trial court's determination of state law just as they are of any other legal question."

(d) Symons v. Mueller Co., 493 F2d 972 (10th Cir. 1973) presents the proposition that:

"A federal district judge sitting within particular state whose law is in question is presumed to be correct."

(e) Jorgensen v. Meade Johnson Laboratories, 483 F2d 237 (10th Cir. 1973) argues that:

"Views of district judge are persuasive and ordinarily accepted."

(f) Linke v. Sorenson, 276 F2d 151 (8th Cir. 1960) states that:

"Where the district court reached a permissible conclusion upon question of North Dakota Law of Limitations, its judgment would be affirmed."

(g) Woodhull v. Minot Clinic, 259 F2d (8th Cir. 1958) argues that:

"Where party brought action to recover purchase price of stock sold on ground of alleged misrepresentation and North Dakota statute recognized legal recission unrelated to equity, holding of federal district court for the District of North Dakota that North Dakota statute prescribing limitations of six years for action for relief on ground of fraud in cases heretofore solely cognizable by court of chancery, was inapplicable in that North Dakota Statute of Limitations commenced to run against a Cause of Action for money had and received from time money was received, could not be said to be legally unpermissable."

The standard of review applied by the Court of Appeals in this case should be a limited standard allowing for reversal of the District Court decision only for "abuse of the sound discretion" of the District Court Judge in his interpretation of local Connecticut law. Friedman v. Sealey, Inc., 274 F2d 255 (10th Cir. 1960), presents the general limited standard of review to be applied in the present case:

"Where different inferences may be drawn from established facts, it is not within province of the reviewing court to substitute its judgment for that of the trial court as to which inference to draw. . .

Where there is evidence from which reasonable men might draw different inferences, appellate courts may not substitute their judgment for that of the trial court."

In addition to the limited standard of review to be applied by the Court of Appeals presented on the foregoing page, the validity of the District Court's judgment is strengthened by the existence of a "presumption of validity" of judgments remained by trial courts. This theory is presented in the following quote taken from 5 Am Jur. 2d Appeal and Error, Sec. 704:

> "The scope of appellate review is largely influenced by a number of rebuttable presumptions, pre-eminent among which is that which at lease, where the decision has been rendered by a court of record or court of general jurisdiction assumes the correctness of the decision or ruling appealed from and the regularity of the proceedings below. See Klamath and M. Tribes v. United States, 296 U. S. 244, 80 L. ed 202, 56 S. Ct. 212 (1935) cited therein. Thus every reasonable intendment favorable to a ruling of the court below will be indulged, and in the absence of an affirmative showing to the contrary, a ruling of the court below will be presumed to have been properly made and for sound reasons."

On the basis of the principles of law presented above, appellee prays that the Court of Appeals affirm the District Court's judgment in favor of appellee and dismiss appellant's case on appeal.

8. WILL EQUITY BAR ITS RELIEF WHERE APPLICABLE STATUTE OF LIMITATIONS BARS CONCURRENT LEGAL REMEDY?

Madison v. Woods, 410 F2d 564 (6th Cir 1969) presents the aforementioned theory that equity will not intervene to grant an analogous remedy at law when the legal remedy is barred by the statute of limitations. The Madison case is very similar, if not identical, to the present case before the court. The court at page 565 of the Madison case presented plaintiff's claims as follows:

> Appellant instituted an action against Appellees in the United States District Court for the Western District of Michigan under the Civil Rights Act, Secs. 1983 and 1985 of Title 42 U. S. C. He alleged that he was a member of the City of Grand Rapids Police Dept. and that Appellees wrongfully deprived him of certain rights arising under the Fourteenth Amendment by demoting him from Sergeant to Patrolman on July 16, 1962 because he was a member of the Negro race. In his original complaint, filed May 12, 1967, Appellant prayed for damages for loss of wages, and for reinstatement to his former position in the Grand Rapids Police Dept. He also prayed that the Court permanently enjoin Appellees from discriminating against him in his job assignments and grant him "any further equitable relief that the Court may deem equitable and proper".
>
> On January 29, 1967, Appellees moved that Appellant's action be dismissed on the ground that it was barred by the applicable statute of limitations. On August 14, 1967, Appellant amended his complaint deleting all reference to Sec. 1985 and striking all claims for damages for loss of wages. The only claims remaining thereafter were those for EQUITABLE RELIEF under Sec. 1983, namely, reinstatement, injunction, and any further relief that

> the Court may deem proper. A hearing was held December 12, 1967 on Appellees' motion and the Court entered an order on that date dismissing the complaint. Appellant appeals from that order(Emphasis added).

The court indicated at page 567 that plaintiff's attempt to amend his complaint so as to prevent application of a three year tort (i. e. injury to person and property) statute of limitations would be an ineffective method of circumventing the legal statute of limitations in order to procure the application of a more liberal equitable statute of limitation:

> We hold that Appellant's claim is controlled by the three-year provision of M. S. A. Sec. 27. 605. We conclude, moreover, that his claim id outlawed even though he amended his complaint to seek purely equitable relief because "equity will withhold its relief . . . where the applicable statute of limitations . . . bar(s) the concurrent legal remedy." Cope v. Anderson, 331 U. S. 461, 464, 67 S. Ct. 1340, 1341, 91 L. Ed. 1602, 1607 (1947); Swan v. Board of Higher Education of City of New York, 319 F. 2d 56 (2d Cir. 1963). True, a remedy at law solely for damages would not have been adequate to restore Appellant to his former position as police sergeant, but the fact that Appellant amended his complaint to seek purely equitable relief does not transform his claim into a purely equitable one allowing him to escape the bar of the statute of limitations. Dixie Margarien Co. v. Schaefer, 139 F. 2d 221 (6th Cir. 1943). Because of the nature of the alleged wrong done to him, Appellant had a concurrent remedy at law for damages which, because of its inadequacy, entitled him to come into equity for more appropriate relief. Since we hold that Appellant's legal remedy was barred by M. S. A. Sec. 27. 605, any equitable relief he may seek must also be barred.

Other federal district court cases which have adhered to the afore-

mentioned principles are:

(a) Cope v. Anderson, 67 S. Ct. 1340, 331 U. S. 461, 91 L Ed. 1602 (1947) argues that:

> Where only the scope of relief sought and multitude of parties sued gives equity concurrent jurisdiction to enforce legal obligation, equity will withhold relief where applicable statute of limitations would bar the concurrent legal remedy.

(b) Cassell v. Taylor, 243 F. 2d 259 (U S. App. D. C. 1957) states that:

> Where federal court has concurrent jurisdiction to grant either equitable or legal relief in enforcement of asserted obligations, equity follows the law and equitable remedy will be withheld, if local statute of limitations would bar concurrent legal remedy.

(c) Todd v. Russell, 104 F. 2d 169, cert gr. 60 S. Ct. 122, 308 U. S. 541, 4 L. Ed. 455 affirmed 60 S. Ct. 527, 309 U. S. 280, 84 L. Ed. 754 indicates that:

> A person should not be permitted to avoid the effect of a limitation statute merely by choosing to bring a suit in equity where there is concurrent jurisdiction and an action at law has become barred.

(d) Overfield v. Pennroad Corp., 146 F. 2d 839 (3rd Cir. 1945) states that:

> Where case is one of concurrent equity jurisdiction, the statute of limitations that bars legal right bars recovery upon it in an action at law or in a suit in equity.

On the basis of the preceding argument, appellee prays for affirmance of the District Court's judgment and dismissal of appellant's case on appeal.

9. SCOPE OF APPELLATE REVIEW OF SUMMARY JUDGMENT PROCEEDING

6 Moore, Federal Practice, page 2022 presents the function of a summary judgment proceeding:

> The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see if there is a genuine need for trial . . . The amendment is not intended to derogate the solemnity of the pleadings. Rather it recognizes that despite the best efforts of counsel to make his pleadings accurate, they may be overwhelmingly contradicted by the proof available to his adversary.

Hence, the motion for summary judgment is directed towards the determination of whether or not "a genuine issue of material fact" exists between the contending parties based on admissable evidence derived from pre-trial discovery proceedings, memorandums of law, briefs and affidavits presented for the purpose of testing the claims alleged in the pleadings on the basis of materials extraneous to the pleadings. Moore goes on to indicate that Rule 56(e) was amended to include the following language so as to overcome a line of Third Circuit Cases which have allowed for the denial of the grant of a summary judgment motion on the grounds that the non-moving party may rest on his pleadings:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for

> trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Hence, once the moving party establishes the non-existence of a genuine issue of material fact, then the burden of persuasion shifts to the non-moving party who must affirmatively establish the EXISTENCE OF A MATERIAL FACT. Failure of the opposing party to carry his burden of persuasion will result in the granting of the motion for summary judgment in favor of the movant. Chapman v. Rudd Paint and Varnish Co., 409 F.2d 635 (1969) illustrates this point:

> When motion for summary judgment is made and supported, the adverse party may not rest on mere allegations or denials of pleadings but must respond by affidavits or otherwise setting forth SPECIFIC FACTS showing the existence of a genuine issue for trial and if he does not so respond, summary judgment, if otherwise appropriate, will be entered against him.

For cases in support of this position, see Franks v. Thompson, 59 F.R.D. 142 (Ala. 1973); Sams v. N.Y. State Board of Parole, 352 F. Supp. 296 (D.C. N.Y. 1972); Lucas v. Ford-Philco Corp., 380 F. Supp. 139 (D.C. Pa 1974); Casper v. Neubert, 498 F.2d 543 (1973).

In establishing the existence of a "genuine issue of material fact", the opposing party must allege specific facts which are not merely conclusory, based on personal knowledge, and admissable as evidence, under the applicable evidentiary rules in force. Ashwell and Co. v. Transamerica Ins. Co., 407 F.2d 762 (Ill 1969) states:

> Conclusory allegations are insufficient to oppose facts well averred in affidavits in support of a motion for summary judgment.

United States v. Cates, 230 F. Supp 273 (D. C. N. Y. 1964) supports this position by stating:

> Vague, conclusory allegations contained in affidavit of defendant's attorney were an inadequate answer to a motion for summary judgment.

As such, the appellant's materials introduced in opposition to the appellee's motion for summary judgment should fail due to the conclusory nature of their averments and their inability to affirmatively establish a genuine issue of material fact.

6 Moore, Federal Practice, page 2472 attempts to set forth the appropriateness of the summary judgment proceeding in various judicial settings. In discussing summary judgment's adaptability to a review of an administrative proceeding, Moore argues:

> But the summary judgment procedure may be peculiarly appropriate in an action to enjoin or enforce an administrative order, because of the type of review provided by statute. Thus in an action to . . . review an administrative order where the plaintiff has no right to "trial de novo" but is limited to a review of the record before the agency and the record is before the court, the case is ripe for summary judgment for whether the order . . . is otherwise assailable involves matters of law. Hence, summary judgment go for the party entitled thereto as a matter of law; plaintiff or defendant as the case may warrant.

Since the District Court proceeding concerned a review of administrative proceedings, the summary judgment device is uniquely appropriate in this

setting.

The scope of review of a judgment granting or denying summary judgment is limited in accordance with the principles enunciated in Dunnington v. First Atlantic National Bank of Daytona Beach, 195 F. 2d 1017 (Fla 1952):

> An appeal from summary judgment entered by District Court on defendant's motion presents for decision single question, whether District Judge, on record before him properly held that there was no genuine issue as to any material fact and that defendant was entitled to judgment as matter of law.

In addition, failure of a party to raise an argument below precludes his presentation of the argument to the appellate court. Garcia v. American Marine Corp. 432 F. 2d 6 (La 1970) argues that a:

> Plaintiff who did not set forth specific facts showing genuine issue for trial could not complain on appeal of trial court's action in granting defendant's motion for summary judgment.

In accord are: Associated Press v. Cook, 513 F. 2d 1300 (Colo 1975) (failure to raise issue of "notice of hearing" motion of summary judgment proceeding could not be raised on appeal due to party's failure to object below); DeBarddeben v. Cummings, 453 F. 2d 320, (Ala 1972) (failure to raise issue below forecloses issue on appeal); and Byrd v. Wolf, 490 F.2d 1277 (Neb 1974) (same as Cummings case, supra).

5 Am Jur 2d Sec. 546 at page 31 re-iterates the principle that appellant is required to adhere to his theory presented to the District Court:

> Corollary to the rule that errors not raised below will ordinarily not be considered on appeal is the rule that

> the reviewing court will consider the case only upon the theory upon which it was tried in the court below.

Appellants have failed to raise the issue as to the existence of more than one cause of action contained in their complaint (see section I(B), especially pages 14 - 18 of appellant's brief) for statute of limitation purposes at the District Court level. As such, appellant's failure in the trial court to assert the existence of two distinct causes of action for statute of limitation purposes precludes the appellate court from considering this new theory on appeal. Appellee, therefore, prays that the appellate court affirms the ruling of the District Court and disregards appellant's argument concerning the aforementioned issue.

10. Does the Connecticut Saving Statute (i.e. Section 52-592 of the Connecticut General Statutes) toll the general Tort Statute of Limitations (i.e. Section 52-577 of the Connecticut General Statutes) applicable to the present Section 1983 proceeding?

Appellee contends that Section 52-592 of the General Statutes does not toll the general Tort Statute of Limitations (i.e. Section 52-577 of the General Statutes). Appellee's conclusion is based on two factors aptly enunciated by District Court Judge Latimer in his "Ruling on Pending Motions" (see page 76 of the Appendix to Appellant's Brief) composed for the action below. These two factors are:

1. Appellant's statutory appeal taken from the disciplinary proceedings heard before the administrative tribunal of the Bridgeport Board of Police Commssioners to the Connecticut Court of Common Pleas for Fairfield County did not constitute an action within the meaning of the Saving Statute (i.e. Section 52-592 of the General Statutes). Since a condition precedent to appellant's enjoyment of benefits under the Savings Statute requires that the proceeding for which the benefits are claimed constitute an "ACTION commenced within the time limited by law" (see first sentence of Section 52-596), appellant's failure to satisfy this prerequisite forecloses appellant's right to benefit under the Saving Statute. See Carbone v. Zoning Board of Appeals, 126 Conn. 602 (1940).

2. The commencement of an independent cause of action in federal District Court four years after the institution of a frustrated state court appeal from the Bridgeport Board of Police Commissioners to the Connecticut Court of Common Pleas (as occurred in the present case) is analogous, if not identical, to the usual type-situation of successive

> attempted appeals not protected under the Savings Statute. As is stated by Judge Latimer on page 3 and 4 of his "Ruling on Pending Motions" appearing on page 78 of the Appendix to Appellant's Brief: Indeed, to the extent that considerations of federal policy may influence application of state law or even permit a tolling without state law basis, the very difference between the Common Pleas proceeding and the federal civil rights litigation counsels against sanctioning extended delay in choosing to institute the latter. The Civil Rights Act suit's commencement need not have awaited state judicial proceedings, and as previously noted the instant action represents far more than a renewed effort in another forum to gain reinstatement, including now as well serious damage claims against various individuals here accused of intentional misconduct. At least in such circumstances, there appears no sound reason to postpone bringing the federal action and accordingly no persuasive justification for suspending the running of the statute of limitations.

Clearly, fundamental principles of statutory construction and analysis of legislative intent logically demand the derivation of the aforementioned conclusions that the general Tort Statute of Limitation was not tolled by the institution of the 1970 action in the Common Pleas Court.

Upon the basis of the reasoning outlined above, appellee prays for affirmance of the District Court judgment and dismissal of appellee's case or appeal.

District Court Judge Latimer's aforementioned conclusion concerning the essential dissimilarity between appellant's state and subsequent federal court actions is supported by evidence presented in District Court by appellant in his document entitled "Brief In Support Of Plaintiff's Motion For Summary Judgment and In Opposition To Defendants' Motion For

Summary Judgment" (See document No. 18 in the "Index To The Record on Appeal"). Appellant evidentially admits against his interest in the District Court the following statements which preclude his position concerning the similarity between the state and federal court actions (see "Appellant's Brief" at page 25 wherein appellant states that "The two cases would then presumably have proceeded on parallel tracks, with plaintiff, at least as to the reinstatement claim, requesting identical relief from both federal and state court."):

> Page 5 of document No. 18 states that "The proceeding on the Application to Vacate the Arbitration Award is not Res Judicata as to this proceeding. An Application to Vacate an Arbitration Award is a limited proceeding at which only certain narrowly prescribed types of claims may be presented. Plaintiff did not present any claim that Rule 98 was unconstitutional on its face or as applied to him. Not only was a different claim presented, but different relief was sought. The Application to Vacate and Arbitration Award can by law result only in an order declaring the award vacated, and in effect putting the parties at status quo ante arbitration. Plaintiff here seeks a declaratory judgment, a mandatory injunction and a compensatory and punitive damages. Since Plaintiff seeks different relief on different grounds, this action is not precluded by the earlier one. See Restatement of Judgments, Section 63, Comment h."
>
> Appellant reiterates his admission on page 11 of document No. 18 in discussing the doctrine of res judicata and its application to the District Court's proceeding. He argues: "Is Plaintiff, (appellant), although discharged in violation of his constitutional rights, barred from prevailing here by the doctrines of Res Judicata or Collater-

> al Estoppel? He is not; this action is based on a different "claim or demand," or "cause of action" from the arbitration proceedings. . ." (Cites omitted).

Although appellant asserts in document No. 19 on page 3 of his brief entitled "Supplemental Brief In Support Of Plaintiff's Motion For Summary Judgment And In Opposition To Defendants' Motion For Summary Judgment" that:

> Plaintiff may very well, then, have been unable to preserve his fifth amendment claim for federal court even had he not asserted it in the application to vacate the arbitration proceeding. Since he may have had to raise the fifth amendment claim in the state court proceeding or not at all, his raising it cannot prejudice his right to present in federal court a claim which the Court of Appeals has specifically held he was not required to raise in the state court proceeding.

Appellant's argument is based on Lombard v. Board of Education of the City of New York, 502 F.2d 631 (2d Cir. 1974), which held at page 637 that "Sec. 1983 confers a choice of forum for constitutional claims on plaintiffs subject only to the restriction that a litigant 'may not have two bites at the cherry." Note that appellant had the right to remove his fifth amendment and proceedural due process claims federal court at any time under 28 U.S.C.A. Sec. 1441. As such appellant may not assert that he should be able to bring the present action in federal District Court on the basis of the Connecticut "Saving Statute". For, appellant has clearly admitted in his documents concerning the

cross-motions for summary judgment that the state and subsequent federal court proceedings were based upon distinct causes of action which were not litigated simultaneously. The availability of a federal forum existed for appellant's claims under Sec. 1441. Therefore, appellant's delay in bringing the federal action was unjustified and District Court Judge Latimer's conclusion concerning the applicability of the Connecticut "Savings Statute" to dissimilar causes of action presented on page 78 of the Appendix to appellant's brief is clearly based on substantial evidence. Appellee contends that the District Court judgment should be affirmed on appeal.

CONCLUSION

On the basis of the aforementioned arguments, appellee, City of Bridgeport, prays that the Court Of Appeals affirm the District Court's grant of appellee's Motion For Summary Judgment and dismiss appellant's assignment of errors on appeal.

Respectfully submitted,

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CERTIFICATION

This is to certify that copies of the foregoing Appellee's Brief was mailed first class, postage pre-paid prior to the thirtieth day of August, 1976 to:

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